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BRIEF FOR APPELLANT.

H. S. Clancy for Appt.

Filed Dec. 4, 1902.

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 40.

MARIANO E. SENA, APPELLANT,

vs.

UNITED STATES OF AMERICA.

Appeal From the Court of Private Land Claims.

H. S. CLANCY,
F. W. CLANCY,
Counsel for Appellant.

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IN THE

Supreme Court of the United States.

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STATEMENT OF CASE.

Claimant bases his claim upon a grant made May 25, 1728, by Governor and Captain General Juan Domingo de Bustamente, to Joseph de Leyba, and copies and translations of the papers evidencing the grant, appear at pages 110 to 113 of the printed record, as Plaintiff's Exhibit A. These papers come from the government archives, and their genuineness and authenticity have never been disputed, but were recognized by the court of private land claims in its opinion (*Record, p. 240*). That court rejected the claim, holding there was a lack of jurisdiction on the ground that the evidence did not show a perfect grant, the petition not having been filed until after the expiration of the two years limited by the act of Congress for the presentation of imperfect titles. The specific ground for holding the title to be imperfect, as set out in the opinion of the court, was that there was no evidence that the requirements of the royal ordinance of 1754 were ever complied with, nor any grounds

to justify a presumption of compliance with those requirements. As the opinion states, that ordinance required that all grants made after 1700, unless already confirmed, "should apply for such confirmation as a prerequisite to validity."

It is well to say here, at the outset, that, whether the court below was right or wrong in this holding, the objection is fully met by evidence discovered since the case was decided below,—evidence which has been submitted to, and received by, this court,—in the face of which the court of private land claims would never have decided as it did, and which makes the case now presented entirely different from the one decided by that court. It shows possession and claim of ownership under the grant for more than fifty-five years after it was made,—a sufficient time to raise every presumption which may be necessary to a decision that the title is perfect. After the decision in the court below, the plaintiff, as appears from his affidavit filed in this court on the day of November, 1901, was advised by his counsel that it was "important that efforts should be made to secure additional evidence, documentary or oral," for presentation to this court,—

> "to show possession and occupation of the land in question by the original grantee and his descendants for a sufficient length of time to raise a conclusive presumption that the provisions of said ordinance of 1754 were complied with, it being probable that no direct evidence of confirmation under that ordinance could be found";

and he was further advised—

> "that there was a possibility of finding such documentary evidence in the disorderly, confused and unindexed mass of Spanish and Mexican archives in the Territorial library at Santa Fe."

After long and protracted search among those archives, in June, 1901, there was found the will of Simon de Leyba,

son of the original grantee, made in the year 1783, which shows occupation and use of the land and claim of title thereto under the grant more than fifty-five years after it was made. This will has been received by this court in evidence, and appears at page 247 of the Record. No question is raised as to its genuineness, as, indeed, none could be, coming as it does from the official archives of a former government. Had this will been before the court of private land claims, it could not possibly have decided as it did. It is to be noted that the will, of which nothing was known at the time of the trial, corroborates the oral evidence then given as to who were the son and grandson of José de Leyba, the original grantee, and removes any possible doubt as to the correctness of the claim that the persons from whom plaintiff acquired his title, were descendants of José de Leyba.

We will proceed to a statement of plaintiff's case. An examination of the grant papers will show that they are regular and complete in form and substance. There is a petition by the grantee to the governor, a grant by that officer and an act of possession by the chief alcalde of the villa of Santa Fe. The grant was then complete. The boundaries set out are—

on the east, the San Marcos road;
on the south an arroyo called Cuesta del Oregano;
on the west, lands of Juan Garcia de las Rivas;
on the north, lands of Sebastian de Vargas.

There was an attempt in the court below by the government to show that the grant was of a very small piece of land close to Santa Fe, but all possible doubt as to the proper location being as claimed by plaintiff, is removed by the later-discovered evidence already mentioned, and we

anticipate that there will be no renewal of this attempt in this court.

Plaintiff put also in evidence (pp. 113–4 of Record) a deed of Joseph Castellanos, dated August 12, 1701, to Miguel Garzia de la Riba, conveying the sitio of the old pueblo de la Cienega. This is from the old Spanish archives, and was offered for the purpose of showing where were the lands of Juan Garcia de las Rivas, given as the western boundary of the grant, the Cienega being well known. That the lands of the Cienega are our western boundary is made clear by the will of Simon de Leyba, made in 1783, which was not before the court below.

Next in evidence is an entry in the book of the Cabildo, a part of the Spanish archives, under date of November 26, 1713 (pp. 115–6 of Record), which shows that Juan Garcia de las Rivas, was the son of Miguel Garcia, the grantee in the deed from Castellanos.

It should be stated that the book of the Cabildo was made in the year 1713, and in it was noted briefly the grants which had been made prior to that time and after the re-conquest of New Mexico. It was made and certified by General Juan Paez Hurtado, alcalde of Santa Fe.

Plaintiff also presented three deeds, and the opinion of the court of private land claims in the case of Purdy *vs.* United States (Exhibits I, J, K, and L, pp. 123 to 131 of Record), which show that the south boundary of the lands of Sebastian de Vargas was the road from Cerrillos to Pecos. These were offered to show the north boundary of the Leyba grant, and the will of Simon de Leyba, already mentioned, declares that the road was the northern boundary.

The eastern boundary, the San Marcos road, is so well known that it appears to have been taken for granted on the trial of the case. Its existence, course and direction are, however, definitely established by two witnesses for the United States.

Record, pp. 43, 44, 47, 54–55.

The southern boundary is not so clearly and definitely located as the other boundaries are. It is certain that it is between the Ojo del Coyote and the Ojo de San Marcos, which lies south of the Ojo del Coyote.

Record, pp. 72, 73, 86, 87, 93, 98.

To show his connection with the title to the property plaintiff put in evidence two deeds to him, made in 1895, one from Salvador Leyba (*Record, p. 116*) and the other from Maria Antonia Leyba de Ramirez (*Record p. 117*). Salvador Leyba in his deed describes himself as the son of Juan Angel Leyba and Inez Apodaca. He was dead at the time of the trial in the court below. Plaintiff testified that this Salvador told him he was the son of Juan Angel Leyba and of Maria Inez Apodaca; that his grandfather was Salvador Leyba, that the father of his grandfather was Simon Leyba, and the father of Simon was José de Leyba. Plaintiff testified also that he visited Maria Inez Apodaca who told him she had been married to Juan Angel Leyba and had only one child, Salvador Leyba (*Record, pp. 13, 14, 15*).

Plaintiff further testified that his grantor, Salvador Leyba, told him also that his grandfather, Salvador, was married to Maria Francisca Lobato and had four children, Manuela, Josefa, Juan Angel and another (*Record, p. 15*); that Josefa was the mother of three children, Maria Antonia, Jesus and Apolonia, before she was married, and that afterward she married but had no children by her husband (*Record, p. 24*).

Manuel Baca y Campos testified that he heard Salvador Leyba state that José Leyba was the original party to the grant, and that Simon Leyba was his son; that Salvador Leyba was a son of Simon Leyba, that Juan Angel Leyba was the son of Salvador Leyba; and that he, the speaker, Salvador, was the son of Juan Angel (*Record, p. 22*).

Agustin Ramirez testified that his father was Serafin Ramirez and his mother, Antonia Leyba; that his mother's mother was Josefa Leyba, whose father was Salvador Antonio Leyba; that the father of Salvador Antonio was Simon Leyba, and that the father of Simon was José Leyba. He also testified that Salvador Leyba was the son of Juan Angel Leyba, who was killed by the Indians a short distance from the property—that is, the grant in question—upon which he was living at the time, and that he was killed before he, the witness, was born (*Record, pp 97, 98, 99, 100*). The witness was 53 years old in August, 1900.

Upon cross-examination some effort was made to discredit this witness because he could not or would not tell who his mother's father was, and because his mother's name appears in certain records and deeds as Sandoval instead of Leyba. As to this, it should be remembered that other information shows that his mother was an illegitimate child, and that she signed her name only by a mark, being unable to write. (*Record, pp. 102–103*). It was shown also that Antonio Sandoval was her godfather (*Record, p. 110*).

This genealogical evidence is corroborated, in part at least, by the church records and by the will of Simon de Leyba, or Zimeon, as given in the will. The church records show the marriage of Joseph de Leyba, August 1, 1739, and the baptism of Salvador Antonio Leyba, son of Simon de Leyba and Feliciana Gonzales, February 1, 1770 (*Record, pp. 243, 244*). The baptism of Simon is not shown by these records, because no record of baptisms earlier than 1747 can be found (*Record, pp. 12, 13*). The will of Zimeon de Leyba declares that he was married to Feliciana Gonzales, and that they had but one child, Salvador Antonio (*Record, p. 246*).

No attempt will be made at this place to state the evidence of possession by the Leybas under the grant, as that can be done more appropriately in the discussion of the second and third points hereinafter set out.

It may seem hardly necessary to assign errors in a case which, under the statute, is here for a retrial upon the issues of fact, but in compliance with the general rule, the appellant has made the following:

ASSIGNMENT OF ERRORS.

In the Supreme Court of the United States.

MARIANO F. SENA, *Appellant*,
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Now comes the said appellant by his counsel and says that there is manifest error in the record of the proceedings in the court of private land claims whence this cause came into this court, and for such error here specifies the following:

1. The court below erred in refusing to suppress the depositions of Susano Leyba and six others, the witnesses being all in attendance at the time of the trial (*Record, pp. 134–5*).

2. The court below erred in receiving in evidence, over objection of plaintiff, the papers designated as Defendant's Exhibits B, C, C1, D, D1, E, E1, F, F1, G, G1, H1, H, I, I1, J, J1, K and K1 (*Record, pp. 70 and 163 to 177*).

3. The court below erred in receiving in evidence the papers designated in the record as Defendant's Exhibits V, W, X and three deeds from Ramirez et ux. to McFerran et al., of May 19, 1866 (*Record, pp. 195 to 237*).

4. The court below erred in refusing to permit the witness Eligio Sedillo to testify to the statements made in 1876 by Manuel Bustamente as to the lands of the Leybas (*Record, p. 104*).

5. The court below erred in holding the title in question to be imperfect.

6. The court below erred in rejecting the claim of plaintiff.

7. The court erred in dismissing the petition of plaintiff.

Wherefore appellant prays that the decree of the court

below be set aside, vacated and altogether held for naught, and that such decree be here made by this court as to the court shall seem proper and as truth and justice may require.

H. S. CLANCY,
F. W. CLANCY,
Counsel for Appellant.

POINTS AND AUTHORITIES.

FIRST.

The Grant was Complete and Perfect When it was Made in 1728.

So far as can be learned, there does not appear to have been, in the early part of the eighteenth century, any limit to the power of a governor and captain general of New Mexico as to the granting of lands belonging to the royal domain. He was the representative of the king in this regard. It is true that he was subordinate to the viceroy at Guadalajara and reported to him his important official acts; but, so far as we are aware, he did not report to that superior officer the giving of lands to those who applied for them, nor did the viceroy ever give any attention to the making, revising, invalidating or confirming of any grant in New Mexico. So that there can be no reason to doubt the proposition that the title given by the governor in 1728 was complete. It is true that it was given "with the condition that he settle the same within the term prescribed by the royal ordinances," and we confess our inability to show what that term was at that time. In view of other evidence this is unimportant. The son of the grantee was in possession more than fifty-five years later, claiming and holding under this grant, which is sufficient to convince that all conditions had been met.

Attention is called to the language of the grantee's petition and of the act of possession, which shows the giving

of a title of the most absolute character,—quite equal to what we call a title in fee simple (*Record, pp. 112–3*).

SECOND.

Possession in 1783, Under the Grant of 1728, Shows a Perfect Title and a Compliance with the Ordinance of 1754.

The correctness of this position can not be doubted, especially in the light of recent decisions by this court.

United States v. *Chaves, 175 U. S. 520 to 524.*
United States v. *Pendell, 185 U. S. 189, 196–200.*

That such possession in 1783, is clearly shown, will appear by reference to the will of Simon de Leyba, which was not before the court below (*Record, p. 247*). The testator declares that he has a grant of lands given by the king to his deceased father, Joseph de Leyba, in 1728, and he sets out the boundaries of the land, which are so nearly the same as in the original grant that there can be no doubt of their identity. In the grant they are—

on the east, by the San Marcos road;
on the south, by an arroyo called Cuesta del Oregano;
on the west, by lands of Juan Garcia de las Rivas;
on the north, by lands of Captain Sebastian de Vargas.

In the will, the boundaries given, are—

on the south the slope (Cuesta) called the arroyo of the Oregano;
on the north, the road which goes towards Pecos from Cerrillos, or lands of the Captain Sebastian de Vargas;
on the east with the road which goes from Santa Fe to the spring of San Marcos;
on the west with lands of the old Pueblo of the Cienega.

That this is the same land admits of no question. As to the northern boundary by reference to the opinion of the court of private land claims, in the case of Purdy vs. United States, (*Record, pp. 126–7*), and to the deed made by Domingo Fernandez, (*Record, pp. 125–6*), it will be seen that the south boundary of Sebastian de Vargas was the road from Pecos to Cerrillos, which explains what the will says. As to the western boundary, the will gives the lands of the old Pueblo of the Cienega, while the original grant gives the lands of Juan Garcia de las Rivas, but this harmonizes with evidence given on the trial in the court below. The Spanish archive No. 732 (*Record, pp. 113–4–5*), is a deed of August 12, 1701, from Joseph Castellanos to Miguel Garzia de la Riba, conveying the sitio of the old Pueblo of the Zienega. This deed recites that General Diego de Vargas had granted the land to Bernabe Jorje, who sold it to Miguel Garzia de la Riba, who sold it to the Alferez Domingo de la Barreda, who sold it to Joseph Castellanos. This was undoubtedly one of the many grants made shortly after the reconquest of the country, of lands which had been occupied before the revolution of 1680, and it must have been made before 1698, as at that time Diego de Vargas was no longer governor, Pedro Cubero being then in office. The connection of Juan Garcia de las Rivas with Miguel is shown by an extract from the Book of the Cabildo,—a part of the Spanish archives,—dated November 26, 1713, from which it appears that Miguel was his father, and was then presumably dead (*Record, pp. 115–6*).

The will also declares that in said grant there was constructed a ranch at the Coyote spring, which is described, and the officer who drew the will certifies that it was executed "at this place of the Coyote Spring on the fifteenth day of the month of October in this year of 1783." The Coyote spring is clearly within the limits of the grant.

THIRD.

If, After October, 1783, Anything Occurred to Divest the Title, the Burden is on the Government to Show It.

Existence of ownership or possession, or both, being proved, it is a well-recognized presumption that they continue unless their cessation is proved by evidence, and the rule is that the burden of proof is upon him who disputes their continued existence.

Lazarus v. *Phelps, 156 U. S. 205.*
Gray v. *Finch, 53 Conn. 513.*
Leport v. *Todd, 32 N. J. L. 123.*
Bayard v. *Colefax, 4 Wash. C. C. 41–2.*
Kidder v. *Stevens, 60 Cal. 419.*
Table Mountain Co. v. *Wallers Co., 4 Nev. 220.*
Bates v. *Prickett, 5 Ind. 22.*
Lind v. *Lind, 53 Minn. 51.*
Anderson v. *Watt, 138 U. S. 706, and cases cited.*
Adams v. *Slate, 87 Ind. 575–6.*
Sullivan v. *Goldman, 19 La. Ann. 13.*
Thomas v. *Hatch, 3 Sumn. 182.*
Clements v. *Hays, 76 Ala. 280, 284.*
Cargile v. *Wood, 63 Mo. 514.*
Gilleland v. *Martin, 3 McLean, 491.*
Higdon's Heirs v. *Higdon's Lessees, 6 J. J. Marsh., 51.*
O'Gara v. *Eisenlohr, 38 N. Y. 299.*
Best on Presumptions, 186.

There is a legal presumption of continuance. A partnership once established is presumed to continue. Life is presumed to exist. Possession is presumed to continue. The fact that a man was a gambler twenty years since justifies the presumption that he continues to be one. An adulterous inter-

course is presumed to continue. So of ownership and non-residence.

Wilkins v. *Earle, 44 N. Y. 172.*

In 1840 it was held by the court of Queen's Bench that a custom of the city of London proved to have existed from time immemorial till 1689, must be taken to exist still, if there be no further evidence proving or disproving its existence. It appears that evidence was given of its exercise from an early period down to 1689, but no proof of its having been exercised, or interfered with, at any later time.

Scales v. *Key, 11 A. & E 819, 824–5–6.*

If the seizin of a party, at a given time, is proved or admitted, the legal presumption is that such seizin continues, and the burden of proof is on him who alleges a disseizin; and that burden remains on him, even after he has given *prima facie* evidence of a disseizin.

Syllabus in *Brown* v. *King, 5 Metc., 173.*
Currier v. *Gale, 9 Allen, 525.*

The plaintiffs, on the trial, having shown a clear documentary title to the premises in dispute, the defense rested solely on the claim of adverse possession. The burden of proof was, therefore, upon the defendants. It was incumbent upon them to establish the fact of adverse possession beyond a reasonable doubt.

Royland v. Updike, 28 N. J. L. 101.

Presumptions of law are rules of law, whether disputable or the contrary. If the disputable presumption is not contradicted or removed by evidence, it is a rule of law to be applied as inflexibly as a presumption that is indisputable or conclusive; in other words, a presumption of law that is disputable, when not changed by evidence, becomes to the court a rule indisputable for the case, and the court is bound to apply it.

> A status once established is presumed by the law to remain, until the contrary appears. (*See People v. Feilen, 58 Cal. 218*); or as a like rule is expressed, in the Code of Civil Procedure (*See Section 1963, subdivision 32*), "that a thing once proved to exist continues as long as is usual with things of that nature."
>
> *Kidder v. Stevens, 60 Cal., 419.*

In the court below, counsel for the government evidently recognized the correctness of this position as to the onus of proof, and made an effort to disprove the continued existence of the grant by the testimony of seven old men, who testified, in substance, to an entire lack of knowledge. They had never heard of a Leyba grant, nor of the lands of Juan Garcia de las Rivas, nor of any ruins near the Coyote spring, nor of the arroyo del Oregano, nor of the cuesta of that name. This is, in effect, all of their testimony so far as it touches the case. It is purely negative in character.

The court should give but little weight to it because—

1st, It was taken ex parte, by deposition;

2d, It is negative;

3d, With but one exception, the witnesses were not cross-examined;

4th, The one who was cross-examined showed utter ignorance not only of this grant, but of all others in that part of the country;

5th, The court below refused to compel the government to produce the witnesses for cross examination at the trial, although they were all in attendance.

These witnesses, and their ages, as they gave them in February, 1900, were Nasario Gonzales, 83; Jesus Narvais, 81; Francisco Romero, 82; Francisco Bustamente, 82; José Venavides, 73; Antonio Bustamente, 73; and Susano Leyba, 66; and their testimony will be found at pages 137 to 162 of the Record. It was taken before one of the justices

of the court below, on February 23, 1900, on the ground that the witnesses were "aged, infirm and ancient persons," and that it was "exceedingly improbable that said witnesses would be able to attend on the hearing of said cause in the court" (*Record, pp. 6, 7, 8*). By some unfortunate mischance or misunderstanding, although notice appears to have been given, counsel for plaintiff did not attend before Judge Stone when this testimony was taken; but, as a matter of fact, every one of the witnesses actually did attend at the trial, and plaintiff then asked the court to suppress the depositions for that reason (*Record, pp. 134–5*), which request was denied and afterwards plaintiff asked the court to require the government to produce the witnesses for cross-examination, which was also refused (*Record, p. 36*).

The basis of these applications by plaintiff will be found in the first sentence of rule 3 of the rules of practice of the court of private land claims, which is as follows:

> In all cases witnesses for either party shall be examined in open court upon the trial of the cause, unless they are sick, infirm, or otherwise unable to attend, and in that event either party desiring the testimony of such witness or witnesses shall make application to the court or any judge thereof to take the deposition of such witness or witnesses, and if it appears to the satisfaction of the court or judge that such witness or witnesses ought not or can not be compelled to appear in court and testify, the court or judge shall make an order allowing the deposition of such witness or witnesses to be taken.

It will be at once apparent that the object of this rule is to enable all of the members of the court to have opportunity to see the witnesses, hear them testify, observe their appearance and demeanor on the stand, and thus better qualify them to judge of the weight to be given to the evidence. It is obvious that the plaintiff was at some disadvantage because of his failure to cross-examine the witnesses, and that a fair regard for the requirements of the rule would

have been served only by putting on the stand in open court these witnesses, all of whom were actually in attendance at the time of the trial.

The assistant to the United States Attorney, who tried the case below, was apparently so much impressed with the force of the objections made by plaintiff that he did call on the trial one of these witnesses, Susano Leyba, who was only sixty-six years old, and presumably better able than the others to bear cross-examination, but the result of his cross-examination was such as to cause counsel for the government to desist from any further attempt to present these witnesses before the court. The witness not only developed entire ignorance on the subject of the Leyba grant, its reputed existence, its boundaries and any claim or occupation by the descendants of the grantee, but he also had never heard of the grant of Alonzo de Aguilar, or of José Miguel de la Peña, nor of the Cleto de Miera and Faustino Pino grant, nor of the Sitio de Juana Lopez grant, nor of the Sitio de los Cerrillos grant, nor of the Cerrillos grant, nor of the Pueblo Viejo de la Cienega, nor of the San Marcos grant. These questions related to four grants in that part of the country, one immediately south of the Leyba grant and the others west of the Leyba grant, which have all been confirmed by the land court, and yet this witness had never heard of their existence. (*Record, pp. 119, 120, 121, 182, 183, 192, and the map between pages 162 and 163*). The lack of knowledge displayed by the witness as to the Leyba grant can not have much weight, and it is not unfair to assume that if the six others had been subjected to the same examination, the same effect would have been produced.

A large part of the examination of these witnesses was devoted to the question of a road from La Cienega to Galisteo, and to showing that this road ran to the east of the Cerro Pelado, or bald hill, in which it appears there is a turquoise mine. Why this point was considered of any importance, is impossible to discover from anything in the

record, except from a statement by C. G. Coleman, a witness for the government, at page 49 of the Record, where he states that plaintiff had claimed that one boundary was along a road from Cienega to Galisteo. There is no word in the record to justify this, but it is evident that upon this mistaken idea, much testimony was taken to show that our alleged boundary would not include the turquoise hill; or this was a deliberate attempt, on the part of counsel for the turquoise company, to mislead and confuse the court by setting up a man of straw who could easily be overthrown. There had been absolutely nothing from the plaintiff to indicate that he ever made such a claim.

The government presented also the evidence of Pedro Muñiz (*Record, pp. 36–40*) and of J. P. McNulty (*Record, pp. 40–43*), which does not appear to be material to anything in controversy. These witnesses must have been called only to show that there was a turquoise mine within the grant, of great possible value, with the idea of discrediting plaintiff's case in some way, although it is difficult to understand this theory. It may well be assumed that plaintiff would not have purchased interests in such a grant, in 1895, unless he believed they were of some substantial value.

The next witness for the defense was Clayton G. Coleman, a special agent of the court of private claims, whose evidence appears at pages 43 to 54 of the Record. What he says is based upon an examination of the land embraced within the grant, and upon information received from people in that vicinity, and is of value as the evidence of an intelligent and truthful witness, but, in many particulars, is not entitled to great consideration, being hearsay in character, derived from living witnesses. He had no difficulty in finding the San Marcos road, which is the eastern boundary, and the road from Cerrillos to Pecos, which is the northern boundary. He says that he was unable to find the arroyo of the Cuesta del Oregano, or the lands of Juan Garcia de las Rivas, which formed the western boundary of

the grant. He does testify, however, on page 51, that there is a rise of land which divides the arroyo where the Coyote Spring is from the place where the San Marcos Spring is, the latter spring being south of the former, and on page 52 he shows substantially about the lands of the Cienega, which are shown upon the sketch map filed with the complaint at page 2 of the printed Record. In this connection, attention should be called to the fact that the three small grants which lie south of the Cienega, as shown on that sketch map, were made long after the grant of the Cienega, which, as already hereinbefore stated, must have been made before 1698, and at the time of the making of the grant of Joseph de Leyba in 1728, what was known under the name of the lands of the old Pueblo of the Cienega, probably extended further south than as shown on the map; but all record of that grant or of its extent has been lost. The nearest approach to any record of it which we have is in archive No. 732 (*Record, p 113*), which shows that it was a grant made to Bernabe Jorje.

Nasario Gonzales, one of the witnesses for the Government, testifies (*Record, p. 142*) that from some of the old title papers it appears that the land was granted to Juan Pais Hurtado, and from him was transferred to Manuel Tenorio de Alva. Of course, this statement can not receive much consideration, as opposed to what appears in Archive No. 732. In the report of the Commissioner of the General Land Office for 1885, at page 400, there is a list of the captains general and governors of New Mexico, from which it appears that Juan Paez Hurtado was governor and captain general in 1704, 1712, 1716, 1717 and 1735; while papers in the archives at Santa Fe show that Manuel Tenorio de Alva was living at Santa Fe as late as 1729. These facts, however, throw hardly any light upon the assertion of Gonzales, but it may possibly be the fact that Manuel Tenorio de Alva had some connection with the title to these lands after 1728.

Mr. Coleman testifies that the Ojo del Coyote is outside of the boundaries of the Leyba grant as claimed by the plaintiff (*Record, p. 46*); but on cross-examination it appears that he based this statement upon the fact that the spring is actually in section 2 of township 14 north, range 8 east, while the plaintiff in the sketch map filed with his petition had located it in section 34 of township 15 north. It is clear that plaintiff claimed the spring to be within the grant, but had merely mistaken its location with reference to the lines of the public land surveys. This witness also gives considerable attention to the road from Cienega to Galisteo, which it had been assumed was claimed as a boundary by the plaintiff in this case, as to which we have already commented. On the map prepared by him he has marked ruins of an old house built by Jesus Narvais, and on page 52 of the Record he says that this old house is about a mile from the Ojo del Coyote, and that Narvais himself told him that he had built the house about twenty years before. It is interesting to note in connection with this statement that other witnesses for the government, in an attempt to account for ruins near the Coyote spring, declare that these ruins of the house of Narvais were close to the spring. This is stated by Nasario Gonzales, at pages 138–9 of the Record, by Jesus Narvais at page 144, by Francisco Romero at page 149, by Antonio Bustamente at page 158, while Susano Leyba, at page 161, declares that there were no ruins at all. Counsel for the Government will agree that any evidence given by Colonel Coleman is worthy of belief, in the face of contradictory statements by a hundred such witnesses as these others.

Mr. William M. Tipton was also called as a witness for the government, but his testimony is confined entirely to the description of topography close to the city of Santa Fe and as to the genuineness of certain Spanish papers which were offered in evidence. His testimony and the documents offered were all in connection with a theory that the Leyba

grant was of a small piece of land just west of Santa Fe and just west of the San Marcos road near where it leaves Santa Fe. It requires no consideration at this time, as it is quite certain that this theory must be abandoned in view of what is contained in the later-discovered will of Simon de Leyba made in 1783.

The government also called Alejandro Montoya, about 77 years old (*Record, pp. 63 to 67*), who testified to his ignorance of any grant of José de Leyba and of the lands of Juan Garcia de las Rivas at Cienega and of the Pueble Viejo de la Cienega and of the Pueblito de los Leybas, and he also says that he never heard of the grant of Los Cerrillos, although he had heard of a grant by the name of Juana Lopez.

The last witness for the government was Gabriel Sena, 57 years old, who testified to a similar lack of knowledge of the claim of José de Leyba or of the existence of the Cuesta of the Arroyo de Oregano or of the lands of Juan Garcia de las Rivas.

Defendant's exhibits C to K1 (*Record, pp. 163 to 177*) were all introduced to support the theory of a Leyba grant close to Santa Fe.

In rebuttal, the plaintiff called Antonio José Campos, R. B. Willison, Agustin Ramirez, Eligio Sedillo and Fernando Nolan.

Campos testified that he was born in 1830, and was well aquainted with the country between Santa Fe and Galisteo from the time when he was 15 years of age; that he knew the pueblo of San Marcos and the Coyote spring to the north of the San Marcos spring, and that he knew the Arroyo de Oregano near the Coyote spring; that he had seen the ruins of a house near to the spring, which, when he first saw them, about 1853 or 1854, were a yard-and-a-half high, and that there were about three or four rooms to the house; that he had heard that these ruins were of houses of the heirs of José de Leyba, and that he heard this from a number of old

men whose names he gives, and that it was a matter of common knowledge. He says also that he heard from these old men that the people who lived in the house near the spring were driven away by Indians who, at the Cuesta del Oregano, killed a man named Juan Angel Leyba, the son of Salvador Leyba.

Mr. Willison testified that he had lived in Santa Fe for thirty-three years, and had been engaged all the time in his business of civil engineer and surveyor; that he was well acquainted with the country south of Santa Fe, as far as the Galisteo river; that he knew the lands in question and the boundaries of the grant; that he was acquainted with the lands of the Pueblo de la Cienega and with the Arroyo of the Cuesta del Oregano, which is something over a mile north of the spring of San Marcos, and near the Coyote spring. He testified that he had known the Coyote spring by that name for about thirty years, but did not remember having heard of the Cuesta del Oregano until about seven years before, although he might have heard of it. He said that he first visited the Coyote spring in the winter of 1869 and 1870, and that on the rocky slope leading down to the spring there were quite extensive ruins of what appeared to have been habitations, one chimney standing at least nine feet high with a fireplace, and that these ruins were sufficient to convince him that within quite a recent period they had been inhabited. He also said that he had been informed by Don Manuel Baca y Delgado (who was dead), about seven years before the trial, that these ruins had been occupied by the descendants of the original grantee in this case (*Record, pp. 86 to 88*). He further testified that the last time he had visited the Coyote spring was two days before the time when he testified, and that he then found very little evidence of there ever having been any habitations at that place; that he had previously been at that spring six or seven years before, and that in the interim the scattered stones had been hauled away evidently, foun-

dations and everything; that he could still discover some evidences of habitations, but very slight compared with what they formerly were; that when he first saw them there had been material for the construction of two or three ordinary-sized houses such as are used in New Mexico, but that when he had last seen the place there was not enough left to make the foundation for one side of an ordinary room (*Record, p. 89*). This is a most curious and extraordinary circumstance.

Agustin Ramirez, 53 years old, testified that he was the son of Serafin Ramirez and Antonia Leyba, and that his maternal grandmother was Josefa Leyba, who was the daughter of Salvador Antonio Leyba, who was the son of Simon, who was the son of José Leyba. He testified also that his mother had a sister, Apolonia Leyba, and a brother, Jesus Leyba; that Apolonia married José Aguilar, but had no children, while Jesus had a number of children of whom he gave the names of five; that Salvador Leyba, who lived at Peña Blanca, was an uncle of his mother,—this may be an error of interpreter or stenographer, as Salvador and Antonia were really cousins,—and was the son of Juan Angel Leyba, who was killed by the Indians a short distance north of the San Marcos spring some time before the witness was born. He said also that Juan Angel was the son of Salvador Leyba, and "lived upon the same property when the Indians killed him," about two or three miles from where he lived; that "he was going to the placer when they killed him, going up the slope, and he was about to go down the slope when they killed him." The witness also testified that he had heard of this grant from his mother, that it was 14 or 15 miles south of Santa Fe, "to the north from where the Coyote spring is," and that he had also heard from her about the Pueblito de los Leybas, but could not state where it is (*Record, pp. 97, 98, 99, 100*).

By "the placer" the witness referred to the place called Dolores.

At this point it seems appropriate to invite attention to some facts which may account for the lack of evidence of possession by the Leybas after the killing of Juan Angel, which probably occurred between 1840 and 1846.

This family, unlike many,—perhaps the majority,—of Spanish families in New Mexico, was not numerous. The original grantee, José de Leyba, had but one child, Simon, the one who made the will in 1783, and he in turn had but one child, Salvador Antonio, baptized in 1760. Salvador Antonio had but four children, one only of whom was a son, Juan Angel, who had but one child, Salvador, who must have been a mere baby when his father was killed. This is shown by Salvador's statement to plaintiff in 1895, that he was 56 years old (*Record, p. 13*), which accords with the affidavit of Felipe Pino, presented to this court last year, in which affiant says he was born in 1839, and that he and Salvador were of the same age and went to school together. It is not unreasonable to conclude that the adult males of this family, capable of occupying and using the land, were exhausted by the death of Juan Angel, and that the children, if any, of his sisters, settled in other places, never cared later to return to this land.

Upon the cross-examination of Agustin Ramirez, nothing was elicited to affect his testimony as to any material facts; but it was evidently the belief of counsel for the government that the witness was not telling the truth as to his mother's descent from the Leybas, and it was developed that he was unable or unwilling to tell who his mother's father was, and, later, it was shown, by documentary evidence, that her name was signed to a deposition and to deeds as Sandoval instead of Leyba, she being unable to write herself.

As to these things, we must remember that the mother of the witness was an illegitimate child, and, if he knew who her father was, he would have a natural and pardonable reluctance to give the information, even upon the witness stand, but probably he did not really know. The docu-

ments to which her name was signed as Sandoval, appear at pages 225 to 237 of the Record, and her deposition, taken in 1883, appears at pages 215 to 225. The documents were made in 1865 and 1866, when her husband, José Serafin Ramirez, was still alive. She probably never knew how her name was signed, being unable to read or write, and why her husband wrote it Sandoval, we can only conjecture. When her testimony was taken in 1883, the interested parties would want her name to be the same as in the deeds of 1866, and it is worthy of note that she was not asked what her name was (*Record, p. 215*). It is shown by the witness Fernando Nolan that his uncle, Antonio Sandoval, was her godfather (*Record, p. 110*).

Eligio Sedillo, 67 years old, was called to testify that, in 1876, when he was a flagman with a surveyor who was surveying the San Marcos grant, a very old man, named Manuel Bustamente, who had been brought as a witness by Nasario Gonzales, and was giving information as to the location of the boundaries of the grant then being surveyed, stated that the lands north of that grant and of the place where they fixed the northern boundary of that grant, were the lands of the Leybas (*Record, pp. 103–4*); but the court refused to receive this evidence, presumably on the ground that it was hearsay.

The witness also testified to ruins near the Coyote spring, about 1854, much the same as Campos (*Record, pp. 104–5*).

Plaintiff also introduced in evidence various documents (*Record, p. 105*), which have already been mentioned and referred to herein, in connection with the different points to which they relate.

To summarize plaintiff's case—

he has a grant made in 1728;

he has possession delivered to the grantee in 1728;

he has the presumption that that possession continues, which presumption must prevail unless overcome by evidence;

he has the fact that such possession actually continued until 1783 when Simon, the son of the grantee, was dying on the land, at the Coyote spring, as is distinctly declared by Simon's will;

he has the presumption that the possession existing in 1783 continues, which presumption must prevail unless overcome by evidence;

he has the fact that Juan Angel the grandson of Simon, was in possession at a date not fixed, but after 1839, and was killed by Indians not far away from the Coyote spring;

he has deeds from the son and niece of Juan Angel;

he has established the location and boundaries of the land;

he has the fact of ruins of houses at the Coyote spring at the place where Simon made his will in 1783.

To meet this case, the government has only the negative evidence of witnesses who have not heard or known of the grant or of the Leybas.

FOURTH.

A Complete Legal Title to Land once Vested Can not be Lost by Failure to Occupy.

Probably, no argument or citation of authority is necessary to support this position, certainly so far as titles under our common law system are concerned. It is well settled that failure to use and occupy land never divests the owner of his title. Something more is necessary before he can be deprived of the beneficial use of his land. Entry upon the land by some other person in hostility to him, and with the intent to claim it as the possessor's property, if continued for a sufficient length of time, will bar the real owner from his right to recover the possession, and, in effect, will give the intruder a complete title.

It is equally true under the Spanish law that mere failure to occupy land never operated to divest a title. It is true that under the Spanish law, a man might abandon his land with intention that it should no longer be his, and then it would become the property of the first who might take it. In this the essential and important ingredient was the intent of the owner, and it may well be questioned whether he might not resume his property at any time before another had taken it. It may be well to see just what is the Spanish law as to failure to occupy, and as to abandonment, although in the present case no evidence has been, or can be, produced tending to show any abandonment by the descendants of Joseph de Leyba with intent no longer to own the land.

The learned Escriche, than whom no higher Spanish authority exists, in his great work, states the law as follows:

> If an owner voluntarily abandons a thing, whether personal or real (*mueble ó raiz*) with intent no longer to count it in the number of his possessions (*bienes*), because it is useless or burdensome, or for mere caprice, he loses his ownership (*dominio*) and the first who occupies it (*or takes possession of it*) makes it his.

The author then points out certain things which are not to be considered as abandoned, such as goods thrown into the sea to lighten a ship, or those thrown on the shore from shipwrecks by the waves, or sheep or lambs carried away by wolves, etc., and finally "houses or lands which one leaves without daring to go or return to them on account of enemies or robbers." This was undoubtedly the case as to this property. Juan Angel Leyba was killed by the Indians about sixty years ago near his house on the grant, and it is a historical fact, of which the court will take notice, that down to the later sixties, life was never safe in New Mexico from attacks by the Navajos anywhere outside of the towns. Although not in the record, we trust it may not be improper

to say that the appellant in this case narrowly escaped death or capture by Navajos when he was a baby in the arms of his mother, who, traveling on horseback in the vicinity of the Cienega, was pursued for some distance by the Indians. This was after 1860.

A little further along in Escriche we find the following:

> Can it be presumed that he abandons his lands, with intent no longer to count them among his possessions, who absents himself for a long time without putting them in charge of anyone, or who, being present, leaves them entirely uncultivated through idleness, neglect or carelessness?
>
> As to the first case, undoubtedly the presumption of abandonment does not arise (*no tiene lugar*); since law 26 of title 12 of Partida 5, far from giving the lands of the neglectful absent one to the first person who may occupy and work them, on the contrary imposes upon him the obligation of caring for and managing them so that through his fault they are not lost nor deteriorated, and of accounting to the owner with credit for expenses, as if he were his agent.

He then goes on to say, in effect, that, as to the second case, there are countries where anyone can appropriate lands which the owner fails to cultivate through neglect, but he specifies only Languedoc and Aragon. In Languedoc lands are considered abandoned if the owner allows three years to pass without cultivating them, and without paying taxes. In Aragon, by the royal cedula of February 28, 1768, those lands which are irrigated from the imperial canal, if the owner fail to cultivate them for a certain time, are given to others who may solicit them. He finds it necessary to make the following interesting argument to justify such confiscation, concluding, however, with some critical observations prompted by his natural sense of justice, and with a statement of the general law on the subject:

> Laws of such a nature have their foundation in the relations between agriculture and ownership and

the public interest of the people. Land has not been given to man except for cultivation; agriculture is that which has produced territorial and permanent property; it is that which has created habitual occupation or control as a means of preserving property; and the works of agriculture are the only acts by which this habitual occupation can be induced. He who ceases, then, the cultivation of his land makes elusory the purpose of the fundamental law which erected property in right (derecho); it can not be said that he occupies or possesses actually or habitually, and, consequently, there is no reason to preserve his property. On the other hand, as the cultivation of the land is the principal basis of the prosperity of the people, every nation is interested in increasing it, and has, therefore, the right to punish him who neglects or abandons it, taking away from him a property which in his hands is sterile and placing it in other hands which are able to make it productive. If it has such right, it has also the duty, because it can not abstain from using all means which may be proper to increase the welfare of the mass and of the individuals who compose it. Is it not, perhaps, bound to give work and bread to the laborers and poor men who ask it? And, in order to comply with this principal obligation of every society, is there any means more natural than to take lands away from him who abandons their cultivation, and to give them to him who has none and desires to make use of them? But it is not always idleness which causes the abandonment of the cultivation of lands; unforeseen misfortunes fall at times upon the head of an owner, and, depriving him of his powers and his means, convert his fields into uncultivated lands. Far from depriving him, then, of his property, far from punishing one misfortune with another misfortune even greater, the necessary advances ought, on the contrary, to be made in a way which will not cause any hardship in order to carry forward his farming operations. It will, then, only when the cessation of cultivation is inexcusable, be just to consider it as a certain proof

> of the abandonment of the property. But these principles are not admitted by our general laws; and that which we find is that every owner preserves the ownership of his lands although he leaves them uncultivated for the space of many years.
>
> *1 Escriche, pp. 6–7–8, Edition of 1847.*

It will be seen, after all, that there is no substantial difference between the condition of the title to lands under the Spanish law and the condition of like titles under our system, although some of our law writers appear to consider that there is a difference. This seems to be the impression of one of our standard writers on the law of real property.

3 Washburn on Real Property, Chap. 2, Sec. 5.

Under our system of laws there can be no doubt that legal title to land once vested can only be divested legally.

3 Washburn on Real Property, Chap. 2, Sec. 1.
Robie v. *Sedgwick, 35 Barb. 329.*
Pickett v. *Dowdall, 1 Wash. (Va.) 115.*

It is quite clear from the quotations made from Dr. Escriche that, under the Spanish law, title to land once vested would never be lost by mere lack of possession or by failure to occupy, but, precisely as under our system of laws, the title might be lost, the right to the use of the land might be lost, by abandonment followed by possession by another person. There is no difference, and in the very nature of things there ought not to be any between the rights of ownership under one or another system, except in accordance with some local and special laws, such as prevail in Languedoc and Aragon. An interesting and striking case is to be found in the Missouri Reports as to what would constitute abandonment of land, although the learned court appears, from the language used, to entertain the erroneous idea that mere abandonment under the Spanish law would cause a loss of title.

Page v. *Scheibel, 11 Mo. 183–4.*

It is to be noted, however, that this case, and others in the same court, were contests between individuals as to the right to possession of land, and consequently involved the question of the acquisition of rights by adverse possession against the owners whose abandonment was alleged.

Fine v. *St. Louis Schools, 30 Mo. 176.*
Clark v. *Hammerle, 36 Mo. 639.*
Landes v. *Perkins, 12 Mo. 256.*
Salle v. *Prim, 3 Mo. 550.*
Barada v. *Blumenthal, 20 Mo. 162.*

The following quotations from the Partidas may be of some value:

> When a man has once acquired possession of a thing, he is presumed to be always in possession, whether he holds it corporeally or otherwise, until he abandons it with intention no longer to retain it: for though he can not all his life, hold it corporeally yet he may retain it in his mind. And not only may such possession be held by him in person but by his attorney, labourer, friend, guest, son or slave, or any of them who holds and uses the thing, in his name.
>
> *1 Moreau & Carleton's Partidas, 400.*

> If a man be dissatisfied with his immoveable estate and abandon it, immediately he departs from it corporeally, with an intention, it shall no longer be his; it will become the property of him who first enters therein. But if he does not leave it, though he were to declare that he did not wish any longer to retain it, yet as long as he remains there no person can enter; and if anyone were to enter, he would not acquire the property thereof until the owner had personally departed from it, and ceased to have possession of it. We likewise say, that if anyone abandon his estate and does not enter upon it, through fear of enemies or robbers; no one else can take possession of it; and if he does he can not acquire the property thereof. For although the owner had not the corporeal possession of his estate, he had nevertheless retained the

property of it, in his mind, and therefore no other person ought or can enter upon it.

1 Moreau & Carleton, 365.

The constructive possession of land, not actually occupied, follows the legal title; that is, in contemplation of law, every man is in possession of the land he owns, until ousted by an intruder, and abandonment of title is not to be presumed from non-entry, nor from neglect to pay taxes. The law does not limit a man's title to the *possessio pedis*. He may own lands he never saw, and an entry once in every cycle of one-and-twenty years is not necessary to preserve his title, because, in the eye of the law, he is in possession all the time. Inchoate rights may be abandoned, but abandonment is scarcely predicable of perfect titles.

Philadelphia v. *Riddle, 25 Pa. St. 263.*

This court, in a recent case, after quoting from section 13 of the act creating the court of private land claims, the language referring to titles not complete and perfect at the date of the acquisition of the property by the United States, but which—

"the claimant would have had a lawful right to make perfect had the territory not been acquired by the United States,"

goes on to say:

"This would preclude the idea that possession since the date of the treaty, however exclusive and notorious, could be regarded as an element going to make up a perfect title."

Crespin v. *United States, 168 U. S. 218.*
Jones v. *Montes, 15 Tex. 353–4.*

With equal force and reason can it be said that the fact of non-possession or lack of actual occupation for any part, or even all, of the time since the date of the treaty, is precluded from consideration, especially in such a case as the

present one, which is brought under section 8 of the act of Congress, which by its terms limits us to the question of whether or not the title "was complete and perfect at the date when the United States acquired sovereignty." The court is to decide what was the condition of the title either in September, 1846, when General Kearney erected a government in New Mexico, or in February, 1848, when the treaty of Guadalupe Hidalgo was made. Nothing which has happened since can be of the slightest consequence.

FIFTH.

Evidence of Reputation of Ancient Ownership and Possession of Land, as Shown by Statements of Aged Persons now Deceased is Competent.

It is apparent from the mere statement of this proposition, that it must be correct from the obvious impossibility in many cases, of obtaining any better evidence. An interesting discussion of the reasons for admitting hearsay evidence in such cases is to be found in a Maryland case.

Casey's Lessee v. *Inloes, 1 Gill, 492–3.*

For the general proposition, we cite the following cases :

Boardman v. *Lessees, 6 Pet. 341.*
Shulte v. *Thompson, 15 Wall. 162–3.*
Sanscrainte v. *Torongo, 87 Mich. 69.*
Wooster v. *Butler, 13 Conn. 313–4, 315–6.*
Scott's Lessee v. *Ollabaugh, 3 H. & McH. 511.*
Sparrow v. *Hovey, 44 Mich. 64.*

In Pennsylvania declarations of deceased persons as to particular facts within their personal knowledge, have been frequently received in such cases.

McCausland v. *Fleming, 63 Pa. St. 38.*

But this court, except in Pennsylvania cases, refuses to go so far, as will be apparent from the following:

> We will not undertake to review the vast number of decisions of State courts upon this subject. It would greatly protract this opinion. Some things may be deduced from them, which, though not universally recognized, are the conclusions to which, we think, a great majority of them lead. In questions of private boundary, declarations of particular facts, as distinguished from reputation, made by deceased persons, are not admissible unless they were made by persons shown to have had knowledge of that whereof they spoke, or persons on the land, or in possession of it when the declarations were made.
>
> *Hunnicutt* v. *Peyton, 102 U. S. 364.*

Oral evidence, adduced by plaintiff in the present case, as to the ancient ownership and possession of the Leybas, falls within the rule indicated by the court, as will be apparent by reference to the evidence of Campos at pages 72–3–4 of the Record, and of Willison at pages 87–8; and the evidence of Sedillo, which the court refused to hear,—page 104,—should have been received. He would have testified that the deceased Manuel Bustamente, twenty-four years before the trial, made statements tending to show the reputation of ownership by the Leybas of the land in question. It appears from the evidence of Campos, at page 73, that Manuel Bustamente was the oldest of the half-dozen old men from whom he learned about the grant when he was young, and he also says, at page 74, that Jesus Narvais, who swears that he was born in 1819,—page 142,—was younger than others of his family whom the witness mentions among his sources of information. It may not be improper to call attention to the fact that more evidence of the same kind was offered to this court last year, as will appear by reference to the affidavit of Felipe Pino, but rejected upon the ground, we assume, that it was merely cumulative.

If more definite and direct evidence can not now be produced, it should be remembered that it is due to defendant, which, through its Congress, failed to provide any satisfactory or authoritative tribunal for the trial of such cases until nearly forty-four years after the treaty of Guadalupe Hidalgo. The court of private land claims was organized in December, 1891, but transacted no business until some months later.

We respectfully submit that the appellant is entitled to a confirmation of the grant made to Joseph de Leyba in 1728.

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